

OPINIONS LAW DEVELOPMENTS--2005

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A. Bar Association Reports

California State Bar Corporations Committee Report on Legal Opinions in Business Transactions:

The Corporations Committee of the Business Law Section published its report, "Legal Opinions in Business Transactions (Excluding the Remedies Opinion)," updating and expanding the Committee's 1989 Report on Legal Opinions In Business Transactions.

The Report discusses the definition and purpose of legal opinions in business transactions; the legal standards applicable to the preparation of such opinions; the preparation of an opinion letter; common opinions and special issues under California law and practice; and related topics. Together with the Opinion Committee's January 2005 Report on Third-Party Remedies Opinions and the report by the Section's UCC Committee on Legal Opinions in Personal Property Secured Transactions (discussed below), the Report culminates a five-year Section project to update its publications on opinion practice.

The Report is available on the Section's members-only website:

<http://members.calbar.ca.gov/sections/buslaw/#corpotion>

California State Bar UCC Opinions Report - Legal Opinions in Personal Property Secured Transactions

The Uniform Commercial Code Committee of the Business Law Section published its report, "Legal Opinions in Personal Property Secured Transactions." The Report updates, expands and replaces its 1989 Report, reflecting both California's adoption of revised Article 9 of the Uniform Commercial Code and changes in customary opinion practice in the intervening years. It discusses security interest opinions generally, explains limitations on the scope of such opinions, and addresses attachment, perfection and priority opinions specifically. Sample formulations of opinions and qualifications are included, as is a sample annotated security interest opinion. While consistent in virtually all respects with the Special Report of the TriBar Opinion Committee: U.C.C. Security Interest Opinions - Revised Article 9 (58 The Business Lawyer 1453, August 2003), the UCC Committee's Report takes a more didactic approach.

The Report is available on the Section's members-only website:

<http://members.calbar.ca.gov/sections/buslaw/#ucc>

B. Caselaw Developments

Grafton Redux:

Last year, we reported that the First District Court of Appeal, in *Grafton v. Superior Court* (Ct. App. 1st Dist., February 6, 2004), had held that pre-dispute jury trial waivers—even in the commercial context—were unenforceable. That decision was appealed to the California Supreme Court. The Supreme Court issued its decision (filed August 4, 2005, with no dissent and one concurrence, reported at **36 Cal. 4th 944 (2005)**) upholding the decision of the Court of Appeal, for the same reasons cited by that court in its decision:

* The California Constitution declares the right to trial by jury to be “inviolable”, and permits it to be waived only “by the consent of the parties expressed as prescribed by statute.”

* California Code of Civil Procedure Section 631, which addresses the waiver of trial by jury, clearly requires the existence of a pre-existing dispute. (The Supreme Court found no indication that the Legislature intended to permit parties to enter into pre-dispute contract waivers, noting that the statutory provisions authorizing arbitration and judicial reference (CCP Sections 1281 and 638, respectively) expressly refer to agreements entered into before the existence of any dispute.)

* Any doubts should be resolved in favor of preserving the right to jury trial.

The court declared that its decision applies retrospectively: “The decision in *Trizec*, supra [*Trizec Properties, Inc. v. Superior Court* (1991) 229 Cal.App.3d 1616], a single Court of Appeal decision that erroneously interpreted our state Constitution, is hardly the kind of ‘uniform body of law that might justifiably relied on . . .’ [citation omitted] . . . Our decision simply will deny to those who might have acted in reliance upon [*Trizec*] a benefit that they never had the right to obtain—that is, a predispute waiver of the right to a jury trial.”

In a concurring opinion, Justice Chin took note, as did the majority, that the Court’s decision was “out of step with the authority in other state and federal jurisdictions,” and urged the Legislature to enact legislation expressly authorizing predispute jury waivers. Unless the Legislature acts, however, pre-dispute jury trial waivers will not be enforceable under California law, and the Opinions Committee recommends that opinion givers rendering a remedies opinion with respect to an agreement consider including an express exception with respect to any such waiver included in the agreement.

The Business Law Section has approved an affirmative legislative proposal by its Corporations Committee to amend Section 631 of the Code of Civil Procedure to allow for contractual pre-trial jury waivers in business-to-business transactions (i.e., non-consumer). As required by the rules and regulations of the State Bar, the proposal is

being circulated to the Bar's sections and standing committees, among others, before being submitted to the Board of Governors for approval. The Business Law Section has requested that the proposal be considered under the Bar's "urgency" rules, in the hope that it might be brought before the Board of Governors at its next regularly-scheduled meeting (March 17-18, 2006, in Los Angeles), and thereafter be introduced in the current session of the Legislature. People having questions may contact Larry Doyle, at Larry.Doyle@calbar.ca.gov or (916) 442-8018, or Saul Bercovitch at Saul.Bercovitch@calbar.ca.gov or (415) 538-2306.

Dean Foods Company v. Pappathanasi et al., 2004 WL 3019442 (Mass.Super. 2004):

Last year, we reported on **Dean Foods**, in which the Superior Court for the Commonwealth of Massachusetts awarded \$7.2 million in damages against a law firm that had delivered a legal opinion in connection with the closing of an acquisition. This past year, the judge presiding over the case spoke informally to the Opinions Committee of the ABA Section of Business Law. While he held in the case that compliance by the opinion giver with customary practice was the proper standard of care, he told the Committee that, absent language within the four corners of a legal opinion indicating to the jurors how the specialized language in an opinion was meant to be interpreted, a jury might not effectively apply that standard. (For example, a jury might not respect the customary understanding that a reference in a legal opinion to "all federal laws," nevertheless excludes antitrust and securities laws, or that an opinion given to the knowledge of an opinion giver does not require that every attorney in the opinion giver's firm be polled.) The judge's comments have prompted commentators to suggest that opinion givers expressly incorporate the customary practice standard—for example, by reference to the Legal Opinion Principles adopted by the ABA's Section of Business Law, or by stating that the opinion is given in accordance with customary practice.

C. Venture Capital Opinions Project

The Opinions Committee, in conjunction with the Corporations Committee, has undertaken a project to determine whether useful guidance can be provided to practitioners concerning third-party legal opinions in venture capital financing transactions, and if so what form that guidance should take. A draft of the project plan has been produced, and a subcommittee of the Opinions Committee, chaired by David Jargiello (650-233-8319; david.jargiello@hellerehrman.com), has been appointed to work with members of the Corporations Committee.

D. Boston Streamlined Opinions Project

The Boston Bar Association Business Law Section has finished its Streamlined Form of Closing Opinion. The final version, with an introduction by commentators Don Glazer and Stan Keller, will be published in the November issue of *The Business Lawyer*.

E. Model Opinion Project

A subcommittee of the Opinions Committee has been created to consider whether it would be advisable to create a model or sample transactional California third-party legal opinion and, if so, to prepare that document. The subcommittee's goal would be to produce a draft consistent with the new State Bar reports and with recent guidance on third-party legal opinions from the TriBar Opinion Committee and the ABA, while being mindful of the Boston Bar's Streamlined Form of Closing Opinion. Tim Hoxie (timothy.hoxie@hellerehrman.com) has been appointed chair of the subcommittee.